1-29-1976

Falcon Coal Company and George Wagoner, Acting Commissioner and Custodian of the Special Fund v. George Duncil and the Workmen's Compensation Board of Kentucky, Composed of Shelby T. Denton, Glenn Schilling, George B. Simpson, Darryl T. Owens and Steve Robbins

Appellant's Brief 1976-SC-0002

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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-2

FALCON COAL COMPANY and
GEORGE WAGONER, Acting Commissioner and Custodian of the SPECIAL FUND - Appellants

versus

GEORGE DUNCIL and
THE WORKMEN'S COMPENSATION BOARD OF KENTUCKY, Composed of Shelby T. Denton, Glenn Schilling, George B. Simpson, Darryl T. Owens and Steve Robbins - Appellees

4434

APPEAL FROM THE PERRY CIRCUIT COURT
HON. DON A. WARD, JUDGE

BRIEF FOR APPELLANTS

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This is to certify that the within Brief has been served on Appellee, George Duncil, by mailing a true copy thereof to his attorney, Hon. Harold Garland Wells, Post Office Box 956, Hazard, Kentucky, 41701; upon the Appellee, Workmen's Compensation Board, by mailing it a copy to its Director, Hon. William L. Huffman, Department of Labor, Frankfort, Kentucky, 40601; and, upon the Trial Judge by mailing a true copy thereof to the Perry Circuit Court, Perry County Courthouse, Hazard, Kentucky, 41701.

This the 27 day of January, 1976.

J W Craft JR

Attorney for Appellants

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 2251, LOUISVILLE, KY.

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STATEMENT OF QUESTIONS PRESENTED

(1) Whether the Appellee's claim is barred for his failure to give proper notice as required under K.R.S. 342.316 (2) (a)?

(2) Whether failed to comply with the provisions of K.R.S. 342.316 (4)?

SUPREME COURT OF KENTUCKY

File No. 76-2

FALCON COAL COMPANY and
GEORGE WAGONER, Acting Commissioner and
Custodian of the SPECIAL FUND - *Appellants*

v.

GEORGE DUNCIL and
THE WORKMEN'S COMPENSATION BOARD OF
KENTUCKY, Composed of Shelby T. Denton,
Glenn Schilling, George B. Simpson, Darryl T. OWENS and Steve Robbins - *Appellees*

APPEAL FROM THE PERRY CIRCUIT COURT
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BRIEF FOR APPELLANTS

May it please the Court:

I.

STATEMENT OF THE CASE.

The Appellee, George Duncil, filed his Application for Adjustment of Claim with the Kentucky Workmen's Compensation Board on or about January 11, 1974, alleging that he became affected with an occupational disease on June 3, 1972. The case was prepared

by the parties, and an Opinion and Award was rendered by the Workmen's Compensation Board on August 11, 1975. In this Opinion and Award the Board held that the Appellee, George Duncil, was totally and permanently disabled as the result of an occupational disease, and allowed him compensation payable by the Appellant, Special Fund, at the rate of $60.00 per week for a period of 425 weeks, beginning June 3, 1972.

Within due time a Petition for Reconsideration was filed by the Appellants, which was overruled by the Workmen's Compensation Board by order dated September 3, 1975. This case was then appealed to the Perry Circuit Court. This Court, by Finding of Fact, Conclusions of Law and Judgment of date October 29, 1975, upheld the Opinion and Award of the Workmen's Compensation Board. (Record, Perry Circuit Court, pp. 11-18.)

The Appellant, Falcon Coal Company, raised a question before the Board, by its motion to dismiss dated August 26, 1974, that the Appellee's claim be dismissed because the Appellee's claim was barred by the provisions of K.R.S. 342.316 (2) (a) and 342.316 (4). This motion was passed to the merits and was summarily overruled by the Opinion and Award of the Workmen's Compensation Board.

II.

ARGUMENT.

(1) The Appellee's Claim is Barred For His Failure to Give Proper Notice as Required Under K.R.S. 342.316 (2) (a).

As stated hereinabove, the Appellants raised the question of the lack of proper notice by motion, as well as by brief before the Workmen's Compensation Board. Both the Workmen's Compensation Board and the court below held that the Appellants stipulated notice at the hearing. The rules of the Workmen's Compensation Board, specifically Section 7, Rules of the 1970 Act, which applies to the case at bar, state that a stipulation of facts is encouraged, and the officer hearing such case shall at the beginning of the hearing ascertain what facts can be stipulated, and place such stipulation in the record. At the hearing of this case, held at Hazard, Kentucky, the Appellant stipulated, and we quote:

> "* * * And that the defendant had notice by reason of a letter dated November 26, 1973 of plaintiff's alleged occupational disease."

K.R.S. 342.316 (2) (a) states, and we quote:

> "The procedure with respect to the giving of notice and determination of claims in occupational disease cases and the compensation and medical benefits payable for disability or death due to such disease shall be the same as in cases of accidental injury or death under the general provisions of this chapter except that notice of claim shall be

> given to the employer as soon as practicable after the employe first experiences a distinct manifestation of an occupational disease in the form of symptons reasonably sufficient to apprise him that he had contacted such disease, or a diagnosis of such disease is first communicated to him, whichever shall first occur."

It is undisputed in this record that the Appellee's last work for the Appellant company was on June 3, 1972; that the Appellee applied for federal black lung benefits in the summer of 1972; and, that he actually received his first check for such benefits in March or April of 1973. (Transcript of Hearing, p. 17.) It is further undisputed that the Appellee was examined by Dr. Richard P. O'Neill and received a report from him in May of 1973 advising him that he had category 1/1 pneumoconiosis. From this undisputed evidence it is apparent that the Appellee had knowledge of his condition in the summer of 1972 when he filed his federal black lung claim, and certainly he knew when he started receiving checks for black lung benefits in March of 1973, but he did not file his claim, nor did he give notice, as contemplated by the Statute, to the Appellant, Falcon Coal Company, until the letter of November of 1973, which is some eighteen months from the date he was aware that he had an occupational disease.

If the fact that the Appellee filed a federal black lung claim in the summer of 1972 is not sufficient to establish that the Appellee had knowledge of his condition, then we cannot see the reasoning of the Board and the court below in their holding that the receipt of an award by the Social Security Administration and the

receipt of a check in March or April of 1973 for federal black lung benefits could be construed in any manner except that the Appellee knew that he was suffering from an occupational disease. In addition to this the Appellee received a report from Dr. O'Neill, who examined him at the request of Appellee's counsel, which indicated that he was suffering from pneumoconiosis and was disabled in May of 1973. Yet, the Appellee did not notify the Appellant company of his condition until November of 1973, some six to eight months later. We cannot conceive of the Board and the lower court's reasoning that the stipulation entered into, which is quoted hereinabove, could be construed as a waiver upon the part of the Appellant company on the question of notice. As stated, the rules of the Workmen's Compensation Board require a stipulation of facts by parties to a compensation case, and it was a fact that the Appellant company received a letter from the Appellee dated November 26, 1973 which letter advised the Appellant company that the Appellee was alleging that he was suffering from an occupational disease. In stipulating this fact, we do not see how the Appellant waived any question of a proper notice as required by K.R.S. 342.316(2)(a).

(2) Appellee Failed to Comply With the Provisions of K.R.S. 342.316 (4).

If the Court agrees with the Board and the court below that the Appellee gave due and timely notice and filed his claim within the time allowed by the Statute, we feel that the Appellee failed to prove a necessary element for recovery, and that being that he had been exposed to the hazards of the disease two years immediately next before his disability as provided for in K.R.S. 342.316(4). The Appellee last worked for the Appellant, Falcon Coal Company, on June 3, 1972. This employment ceased because the Appellee was cut off by the Appellant company, and he testified that he drew the maximum unemployment compensation for 26 weeks. He further testified that he went to work in December of 1973 for a construction company (Transcript of Evidence, p. 10).

This Court, in the case of *John W. Young, Commissioner of Labor, Et Al.* v. *Dave Jones,* Ky., 481 S. W. 2d 268 held, and we quote:

> "[1] KRS 342.316(4), as construed in Inland Steel Company v. Terry, Ky., 464 S. W. 2d 284, and in Southeast Coal Company v. Caudell, Ky., 465 S. W. 2d 62 (1971) and as applied in Carco Mining Company v. Ely, Ky., 465 S. W. 2d 265 (1971), requires that the claimant prove that he was exposed to the hazards of the disease for at least two years immediately preceding disability as the term 'disability' has been construed by this court in occupational disease cases. He must also show that the continuity of exposure during that

> time was without substantial interruption regardless of where the claimant was or what he was doing during the period or periods of such interruption."

Also in the case of *James R. Yocum* v. *Fred Overstreet,* Ky., 512 S. W. 2d 940, this Court held, and we quote:

> "[1] In Inland Steel Company v. Terry, Ky., 464 S. W. 2d 284, this court held that what constitutes a substantial interruption of the required exposure is basically a factual question for the board, unless the facts are so clear that it can be decided as a matter of law. We are not persuaded by Overstreet's argument, as relates to the length of an interruption, that an interruption of only four months is as a matter of law not a substantial interruption. The holding in South East Coal Company v. Caudill, Ky., 465 S. W. 2d 62, was not that any interruption of less than six months was as a matter of law not a substantial interruption; the holding was that any interruption of as much as six months was as a matter of law a substantial interruption. And the decision in Young v. Jones, Ky., 481 S. W. 2d 268, negatives the proposition that an interruption of less than six months cannot be a substantial one.
>
> In the instant case the board found as a fact that the interruption of four months was substantial. We do not find in the board's opinion and award any indication that the board felt it was required as a matter of law, by Young v. Jones, to find that the four months constituted a substantial period."

The Board held that the Appellee became disabled in June of 1972, which was the last date he worked for

the Appellant company, but it is to be remembered that the Appellee did not cease work for the Appellant company because he was unable to work. On the contrary, he testified that he was laid off from work, and that he then applied and drew unemployment compensation and drew nearly the maximum until he secured other employment. For this reason we do not feel that the Board could find the plaintiff was disabled, when he himself admits that he was seeking employment, drawing unemployment compensation, and actually did find employment, although it was for a short period of time. The Unemployment Insurance Division of the State of Kentucky recognized that employment, because it ceased to pay the Appellee benefits after he was employed (Transcript of Evidence, p. 16).

III.

CONCLUSION.

We feel that if this Court is of the opinion that the Appellee was disabled when he ceased work for the Appellant company on June 3, 1972, then this case should be reversed and remanded to the court below and the Workmen's Compensation Board with directions that the Appellee's Application for Adjustment of Claim be dismissed because of his failure to comply with K.R.S. 342.316(2)(a). On the other hand, if this Court believes from the uncontradicted evidence in this case that the Appellee was not disabled at that time, then Appellee has failed to prove that he had

exposure for two years immediately next before his disability as required by K.R.S. 342.316(4).

Respectfully submitted,

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